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CITATIONS

...s:

Statutes, executive order and regulations—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1972

No.

UNITED STATES OF AMERICA, PETITIONER

v.

PENNSYLVANIA INDUSTRIAL CHEMICAL CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals (App. A, *infra*, pp. 1a-27a) are reported at 461 F.2d 468. The memorandum opinion of the district court on defendant's motion for judgment of acquittal (App. C, *infra*, pp. 29a-41a) is reported at 329 F. Supp. 1118.

JURISDICTION

The judgment of the court of appeals was entered on May 30, 1972 (App. B, *infra*, p. 28a). A petition for rehearing was denied on August 21, 1972 (App. D, *infra*, p. 42a). On September 18, 1972, Mr. Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including October 20, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government's alleged failure to institute a formal permit program under the Refuse Act of 1899 (33 U.S.C. 407) with respect to industrial discharges into navigable rivers of refuse which does not adversely affect navigation is, if proved, a bar to criminal prosecutions under that statute for such discharges.

2. Whether the defendant's claim that it was affirmatively misled by the Corps of Engineers into believing that it could with impunity discharge into the Monongahela River refuse not tending adversely to affect navigation is an adequate defense to the present prosecution.

STATUTES INVOLVED

Section 13 of the Rivers and Harbors Act of 1899 (the "Refuse Act"), 30 Stat. 1152, 33 U.S.C. 407, provides in pertinent part:

It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited * * * from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water * * *: *And provided further*, That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful.

Section 16 of the Rivers and Harbors Act of 1899, 30 Stat. 1153, 33 U.S. 411, provides in pertinent part:

Every person and every corporation that shall violate * * * sections 407, 408, and 409 of this title shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500 * * *.

STATEMENT

This prosecution was initiated on April 6, 1971, by the filing of a criminal information alleging that the Pennsylvania Industrial Chemical Corporation ("PICCO") had on four separate occasions discharged from its industrial plant certain refuse matters into the Monongahela River, in violation of 33 U.S.C. 407 and 411. Following a jury trial in the United States District Court for the Western District of Pennsylvania, PICCO was convicted on all four counts; the maximum fine allowable by statute, $2,500.00, was imposed on each count. The court of appeals reversed and remanded the cause to the district court for further proceedings (App. A, *infra*, pp. 1a-27a).

1. At trial, it was stipulated that PICCO was the owner of a manufacturing establishment on the bank of the Monongahela River, a navigable water of the United States, and that the concrete and iron pipes which deposited into that river the alleged refuse matter involved here were also owned by PICCO (App. C, *infra*, p. 30a). The concrete pipe served only PICCO's plant; the iron pipe served the plant and several private residences nearby (*ibid.*).

On the basis of tested samples taken from the discharges at both pipes (App. A, *infra*, p. 3a), the criminal information charged that the effluent was "iron, aluminum, and compounds containing these chemicals, [and others] * * *, and solids * * *."[1]

[1] The criminal information, as amended, is reproduced in the printed appendix filed in the court of appeals at pp. 3a-5a.

A dispute arose at trial over whether the sampled deposits constituted "refuse matter" within the meaning of the Act. PICCO contended that the quoted term covered only matter that would "impede navigation," and thus did not include the liquid solution flowing through its pipes; it also urged that the discharge from its plant was, in any event, nothing more than "sewage," which was specifically excepted from the statutory proscription (App. A, *infra*, pp. 4a-5a).[2] These issues were resolved against PICCO by the district court, which held (1) that the statutory prohibition against the discharge of refuse did not depend on a resulting hindrance to navigation (App. C, *infra*, p. 31a), and (2) that, since "each of the effluents was 'industrial waste,' not 'sewage,'" it was "refuse matter in violation of the Refuse Act" (*id.* at p. 32a). These rulings were affirmed by the court of appeals (App. A, *infra*, pp. 4a-6a).[3]

2. No effort was made by PICCO to obtain a permit from the Secretary of the Army to discharge effluents into the Monongahela River (App. C, *infra*,

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[2] The Refuse Act excepts from its coverage "* * * refuse matter * * * flowing from streets and sewers and passing therefrom in a liquid state into any navigable water of the United States * * *" (33 U.S.C. 407).

[3] Both courts below also rejected PICCO's contention that the term "refuse" in the 1899 Act should be defined in light of the water quality standards established pursuant to Section 10(c)(1) of the Water Pollution Control Act of 1948, as amended (33 U.S.C. 1160(c)(1)). "Such a course of action would be unjustified" (App. A, *infra*, p. 8a), the court of appeals held, "[i]n view of * * * significant differences [between the two statutes] in approach, and the 'cardinal rule that repeals [of legislation] by implication are not favored' * * *" (*ibid.*).

p. 30a).[4] The company offered at trial to show, by reference to certain regulations of the Corps of Engineers, that the federal government never had a program for issuing discharge permits under the Refuse Act before December 1970.[5] It further offered to show, on the basis of the Corps of Engineers' alleged enforcement policy under the Act and on the basis of a 1949 conversation between officials of the Corps of Engineers and PICCO purportedly concerning a possible permit application, that it had been affirmatively misled into not applying for a federal discharge permit under the statute (App. A, *infra*, p. 18a). These offers of proof were disallowed by the district court on the ground that they were not relevant to the issue of guilt under the Act (App. C, *infra*, p. 35a). PICCO was convicted on all counts.

3. The court of appeals reversed (App. A, *infra*, pp. 1a-27a). It rejected the district court's construction of the statutory discharge prohibition as oper-

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[4] An offer to prove that PICCO had obtained a discharge permit from the Commonwealth of Pennsylvania was disallowed by the district court (App. C, *infra*, pp. 33a, 40a).

[5] In December 1970, the President announced the establishment of a formal Refuse Act permit program (Exec. Order 11574); regulations implementing that program became effective April 7, 1971 (33 C.F.R. 209.131). Issuance of permits under the new regulations has, however, been enjoined by the District of Columbia district court on the ground that the regulations fail to satisfy all requirements under the National Environental Policy Act of 1969, 42 U.S.C. 4332(2)(C). See *Kalur* v. *Resor*, 335 F. Supp. 1 (D.D.C.). That decision is presently pending on appeal, C.A.D.C., No. 72-1413. See also *Sierra Club* v. *Sargent*, 2 E.L.R. 20131 (E.D. Wash.), appeal pending, C.A. 9, Misc. No. 6086.

ating regardless of the absence of formalized permit procedures. Such a general proscription on the depositing of any "foreign substance" into the navigable waters of this country would, the court concluded (App. A, *infra*, p. 10a), have had a "drastic impact * * * on the nation's economy even in 1899." In its view, a narrower reading of the Act was intended (*id.* at 15a):

> Congress contemplated a regulatory program pursuant to which persons in PICCO's position would be able to discharge industrial refuse at the discretion of the Secretary of the Army. It intended criminal penalties for those who failed to comply with this regulatory program. Congress did not, however, intend criminal penalties for people who failed to comply with a non-existent regulatory program.

Support for this position was apparently found in "Congress' subsequent enactments in the water quality field" (*id.* at p. 10a). The court of appeals stated (*ibid.*) that "[t]here would appear to be something fundamentally inconsistent between the program of developing and enforcing water quality standards under the Water Quality Act and Section 13 of the Rivers and Harbors Act, if the effect of the latter is to prohibit all discharges of industrial waste into navigable waters." As it viewed the matter, "[w]hat makes the two statutes compatible is the permit program contemplated by Section 13" (*ibid.*).

As an alternative basis for reversal, a majority of the court held that the district court had erred

in disallowing PICCO's offer of proof that it had been affirmatively misled by the Corps of Engineers into believing that it was not necessary to obtain a federal discharge permit. Establishment of that proposition, it held (App. A, *infra*, pp. 24a-25a), would give rise to a due process defense to the prosecution.*

Accordingly, the case was remanded to the district court to give PICCO "the opportunity to prove the non-existence of a permit program at the time of the alleged offense," or, if unable to establish that, "to attempt to prove that the Corps of Engineers affirmatively misled it into believing that a permit was not necessary in its situation" (App. A, *infra*, p. 25a).

REASONS FOR GRANTING THE WRIT

The narrow construction given by the court of appeals to the Refuse Act of 1899 (Section 13 of the Rivers and Harbors Act) in practical effect repeals that statute and essentially eliminates the most effective weapon that has, until very recently, been available to the federal government in its concerted

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* On this point, one judge dissented. He observed that *United States* v. *Standard Oil Co.*, 384 U.S. 224, 230, and *United States* v. *Esso Standard Oil Co. of Puerto Rico*, 375 F. 2d 621 (C.A. 3), had settled the question of the applicability of the Refuse Act to industrial discharges such as those involved here well before PICCO's alleged violations occurred. "While I agree," he stated (App. A, *infra*, pp. 26a-27a), "that [due process] may require a court to recognize the defense suggested by [the majority] * * *, I do not believe that a citizen may reasonably rely on a statement in an administrative regulation when the judicial branch of the government has already declared the contrary."

efforts to combat industrial pollution of the Nation's navigable waters. That the discharge of industrial waste into the rivers of this country poses an ever-increasing threat to the rivers themselves, and to the health and welfare of persons touched by polluted waters, has in recent years become so well recognized as not to require extensive discussion.

With the growing national awareness of the magnitude of the problem in this area, the federal government has undertaken an extensive water pollution control program. As an essential part of that program, a large number of suits, such as the one involved here, have been instituted under the Refuse Act of 1899, a statute which, prior to October 18, 1972, provided the only federal criminal sanction against industrial water pollution.[7] This flurry of litigation, which admittedly contrasts sharply with past sporadic enforcement efforts under the Act,[8] is based, *inter alia*, on two decisions of this Court, which emphasize that "* * * the history of [the Act] and of related legislation dealing with our free-flowing rivers 'forbids a narrow, cramped reading' of Section 13." *United States* v. *Republic Steel Cor-*

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[7] On October 18, 1972, the Federal Water Pollution Control Act Amendments of 1972 (S. 2770) were enacted into law. That statute contains its own criminal enforcement provisions to assure compliance with both its water quality standards and its discharge permit program (see Section 309(c)). See n. 9, *infra*.

[8] See, *e.g.*, *Scow No. 36*, 144 Fed. 932 (C.A. 1); *La Merced*, 84 F. 2d 444 (C.A. 9); *The President Coolidge*, 101 F. 2d 638 (C.A. 9); *United States* v. *Ballard Oil Co. of Hartford*, 195 F. 2d 369 (C.A. 2).

poration, 362 U.S. 482, 491; *United States* v. *Standard Oil Co.*, 384 U.S. 224, 226. *Standard Oil* removed all doubt that the statutory term "refuse" includes "all foreign substances and pollutants" (384 U.S. at 229-230). *Republic Steel* established that the Act's prohibition covers industrial discharges of refuse matter, even if deposited into the river by way of sewers (362 U.S. at 490-491); and the Court there held that a civil injunctive remedy is available under the Act to halt illegal discharges (*id.* at 485).

On this authority, both civil and criminal actions under the Refuse Act have been commenced on a major scale in recent years. Of the 128 suits seeking Section 13 injunctive relief that have been brought since 1970, there are approximately 70 still pending. And 115 of the 518 criminal cases commenced during the same period remain undecided. The decision below, if allowed to stand, would apparently call for judgments of acquittal in the pending criminal cases and would raise serious doubt about the availability of civil relief.*

The narrow construction of the Act adopted by the court of appeals thus threatens to dissipate much

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* While the Federal Water Pollution Control Act Amendments of 1972 require a moratorium on future litigation under the 1899 Act until December 31, 1974, or, if sooner, until final administrative action has been taken on permit applications submitted under the new statute (Section 402(k)), they also explicitly provide that pending actions under the earlier statute "shall [not] abate by reason of the taking effect of the amendment made by Section 2 of this Act" (Section 4(a)). The holding of the court below would render this saving provision in the 1972 legislation effectively meaningless.

of the force behind the government's current water pollution control program,[10] and review by this Court is therefore warranted.[11]

1. In holding that the Refuse Act of 1899 contemplates, as a condition to its enforcement against the discharge into navigable waters of refuse matter not harmful to navigation, the establishment by the government of a formal "regulatory program" (App. A, *infra*, p. 10a) permitting such discharges, the court of appeals misconstrued both the plain language of the statute and the clear intent of the legislature as reflected by "subsequent enactments in the water quality field" (*ibid.*).

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[10] The civil enforcement provisions of the Water Pollution Control Act, 33 U.S.C. (1970 ed) 1151 *et seq.*, have heretofore been of limited use in dealing with the serious problems of industrial water pollution. The remedy under that statute, which essentially provided for the establishment of water quality standards for certain of the Nation's waterways, was generally available with respect to a covered waterway only insofar as the pollution had an interstate effect (33 U.S.C. 1160(g)), and only after a 180-day notice period prior to the commencement of litigation (see App. A, *infra*, p. 8a). It may well be, however, that the civil enforcement provisions under the 1972 Amendments to that statute (see n. 7, *supra*) will be more effective once the administrative machinery contemplated by the new Act has been established and the civil remedies become generally available.

[11] We do not believe that the court of appeals' remand order in this case provides a basis for deferring review by this Court of the legal issues presented in the petition. If the district court should on remand resolve the factual questions against the government, it would be required under the court of appeals' legal theory to acquit PICCO on the criminal charges. The government would then be precluded from appealing the case and this Court would be denied an opportunity to review the issues that are now properly before it.

a. By its terms, the Act imposes a ban on the discharge or deposit of "any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state * * *" (33 U.S.C. 407). As we earlier indicated, this Court has held on at least two occasions that this legislative prohibition must be read "broadly" in order to achieve its fundamental purpose to protect the navigable waters of this country from discharges that are harmful, either because they effectively impede navigation or because they cause pollution. See *United States* v. *Republic Steel Corp.*, *supra; United States* v. *Standard Oil Co.*, *supra.*

The statutory language on which the court below relied, emasculating the clear thrust of the Act's operative provision, is contained in a second proviso to the general prohibition, which reads in relevant part (33 U.S.C. 407; emphasis supplied): "That the Secretary of the Army * * * *may permit* the deposit [of refuse matter deemed not to be injurious to navigation] * * * within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material * * *." As we read this language, and as it has long been construed by those responsible for administering it,[12] the proviso vests in the Secretary of the Army broad discretion—which he has "exer-

[12] Such a long-standing construction by the responsible authority is, of course, entitled to great weight. See *Udall* v. *Tallman*, 380 U.S. 1, 16.

cised * * * from time to time" [13]—to permit on prior application certain river deposits proscribed by the Act. See *United States* v. *Republic Steel Corp.*, 286 F. 2d 875, 879, on remand from 362 U.S. 482. This authority in essence allows the Secretary in isolated instances to immunize from criminal prosecution discharges that are otherwise unlawful. See *United States* v. *United States Steel Corp.*, 328 F. Supp. 354, 360 (N.D. Ind.), appeal pending, C.A. 7, No. 72-1590; *United States* v. *United States Steel Corp.*, 3 E.R.C. 1057 (N.D. Ill.). It does not, however, require that he take such action; the statutory language in this regard is clearly permissive, not mandatory. In contrast to other portions of the 1899 legislation, the second proviso in Section 13 does not in terms call for a formal regulatory scheme to make the broad anti-dumping provision operative.[14]

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[13] In discussing the permit authority under Section 13, the Corps of Engineers' 1968 revision to its pertinent regulations (33 C.F.R. (1968 ed.) 209.120(d)) stated, as quoted by the court below (App. A, *infra*, pp. 13a-14a):

> (2) Section 13 of the River and Harbor Act of March 3, 1899 (30 Stat. 1152, 33 U.S.C. 407) authorizes the Secretary of the Army to permit the deposit of refuse matter in navigable waters, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, within limits to be defined and under conditions to be prescribed by him. Although the Department has exercised this authority from time to time, it is considered preferable to act under Section 4 of the River and Harbor Act of March 3, 1905 (33 Stat. 1147; 33 U.S.C. 419). * * *

[14] Compare Section 11 of the Rivers and Harbors Act of 1899, 33 U.S.C. 404, which authorizes the Secretary of the Army to establish harbor lines beyond which works may not

The court below had no warrant for rewriting the statute to require such a scheme, when Congress had not done so.

Indeed, the decision below stands the statute on its head. What Congress intended generally to proscribe—*i.e.*, the discharge of industrial pollutants (see *United States* v. *Standard Oil Co.*, *supra*, 384 U.S. at 229-230)—becomes generally permissible. The proviso's *limited* defense to a Section 13 prosecution for discharges which the Secretary in his discretion "may permit," is expanded by the court of appeals into an *absolute* defense in the absence of a regulatory program which Congress did not prescribe. No longer is it enough that the Secretary, consistent with past practice, exercise his "permit" authority informally on the prior submission of a discharge application;[15] he must, under the opinion below, de-

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be extended or deposits made "except under such regulations as may be prescribed from time to time by him." And see Section 4 of the Rivers and Harbors Act of 1905, 33 Stat. 1147, 33 U.S.C. 419, authorizing regulations regarding the transportation and dumping of dredgings. See also Section 402 of the Federal Water Pollution Control Act Amendments of 1972, where Congress has specifically provided for an administrative "permit program."

[15] The court of appeals suggests that PICCO cannot be faulted for failing to seek a federal discharge permit, since requiring it to file an application would merely put it "through a charade * * * for something which did not exist" (App. A, *infra*, pp. 15a-16a). It does not follow, however, that because no formal "regulatory program" exists, no discharge permits issue. As pointed out below (*id.* at p. 14a), the Secretary has not determined "to deny permits on a blanket basis to all seeking to discharge industrial refuse having no adverse affect on navigation." Rather he has "from time to time" granted

vise a formal "regulatory program" as a condition to any prosecutions for the illegal discharge of pollutants (App. A, *infra*, pp. 14a-15a). Such a broad reading of a proviso—one which essentially removes from the reach of the criminal statute the very activity it was designed to prohibit—is not warranted by any principle of statutory construction. See *Dollar Savings Bank* v. *United States*, 19 Wall. 227, 236-237.[16]

b. We submit, moreover, that later enactments by Congress in the water quality field do not require the result reached below. On at least four separate occasions in the past 24 years, legislation has been passed in this area; Congress has consistently provided, how-

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permission for such discharges to those making prior application (App. A, *infra*, p. 13a). Whether the Secretary would have acted favorably on PICCO's application, had one been submitted, is, of course, open to conjecture on this record, since he was not given the opportunity to consider the matter. But it must be assumed, "contrary to what is argued, that [the] government officials who bear the responsibility [would] not [have] act[ed] arbitrarily or capriciously * * *." *United States* v. *Republic Steel Corp.*, *supra*, 286 F. 2d at 879.

[16] Neither *Brown* v. *State*, 167 S.W. 348 (Tex. Ct. App.), nor *Mitchell* v. *Dixon*, 168 S.W. 2d 654 (Tex. Com. App.), on which the court of appeals relies, support its reading of the statute. Those cases hold that where a licensing statute or ordinance requires the establishment of a board to review license applications to carry on specified activity, and no such board has been established, an individual cannot be convicted for engaging in that activity without a license. By contrast, the Refuse Act, which is a criminal statute, designates the Secretary of the Army as the official to issue permits; there is no requirement that a separate board of review be established; nor is the Secretary required to do more than act on permit applications that are submitted.

ever, that the new statutes are not to be construed as "affecting or impairing the provisions of * * * [section 13] * * * of [the Refuse Act]." [17]

The court of appeals relies primarily on "the program of developing and enforcing water quality standards under the Water Quality Act * * *" (App. A, *infra*, p. 10a) to sustain its construction of the Refuse Act as "a regulatory program rather than a general prohibition" (*ibid.*). The argument apparently is that, since the Water Quality Act contemplates discharges that meet minimum water quality standards, as set forth by state agencies, it would be "fundamentally inconsistent" to read Section 13 as imposing a ban on all pollutant discharges (*ibid.*). But, contrary to the suggestion below, it does not follow from that major premise that the establishment of a formal, regulatory permit program under the Refuse Act is necessary to make that statute "compatible" with subsequent legislation. The 1899 Act explicitly authorizes the Secretary of the Army to act on individual discharge applications submitted to him. In exercising his discretion in this area, he has recently been instructed by Congress not to grant any permit if the proposed discharge fails to meet minimum water quality standards established

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[17] See Section 11 of the Water Pollution Control Act of 1948, 62 Stat. 1161, as amended in 1956, 70 Stat. 507, as further amended by the Water Quality Act of 1965, 79 Stat. 903, and as further amended by the Water Quality Improvement Act of 1970, 84 Stat. 113; 33 U.S.C. 1174. And see the similar savings clause in Section 4(a) of the 1972 Act, quoted in relevant part at n. 9, *supra*.

in the Water Pollution Control Act. See Water Quality Improvement Act of 1970, 84 Stat. 108, 33 U.S.C. 1171(b)(1). This limitation on the Secretary's *permit* power, however, in no way undermines the general *prohibition*. There is nothing "fundamentally inconsistent" in banning generally the unauthorized discharge of industrial pollutants into our navigable waters (33 U.S.C. 407), on the one hand, and imposing water quality restrictions on the Secretary with respect to those discharges he deems it appropriate in his discretion to permit (33 U.S.C. 1171(b)(1)), on the other. See *United States* v. *Interlake Steel Corp.*, 297 F. Supp. 912, 916-917 (N.D. Ill.); *United States* v. *United States Steel Corp.*, 328 F. Supp. 354 (N.D. Ind.), appeal pending, C.A. 7, No. 72-1590; *United States* v. *Maplewood Poultry Co.*, 327 F. Supp. 686 (D. Me.).[18]

2. Finally, we disagree with the alternative ground on which the majority of the court of appeals also relied for reversal: *i.e.*, that PICCO should be permitted to assert as a defense that it was affirmatively misled by the Corps of Engineers into believing that discharges which had no adverse effect on navigation were not covered by the statutory proscription (App. A, *infra*, pp. 17a-25a).

The statute itself makes no distinction between discharges adversely affecting navigation and other

[18] Under the 1972 Act, the authority conferred on the Secretary of the Army under the Refuse Act to permit certain discharges has been rescinded (Section 402(a)(5)). The Environmental Protection Agency has the responsibility under the new legislation to administer the permit program (see Sections 101(d) and 402).

discharges; it bans the depositing into navigable waters of "any refuse matter of any kind or description whatever, other than [sewage]" (33 U.S.C. 407). Even assuming—as did the court below (App. A, *infra*, p. 23a)—that the Corps of Engineers enforcement policy under the Act, as set forth in 33 C.F.R. (1967 ed.) 209.395, had prior to December 1970 (see n. 5, *supra*), "* * * been directed * * * principally against the discharge of those materials that are obtrusive or injurious to navigation," that, we submit, would not provide an adequate basis for recognizing the due process defense raised here.

More than three years before the alleged violations involved in this case, this Court explicity rejected the argument that the Refuse Act prohibits only navigation-impeding discharges. In *United States* v. *Standard Oil Co.*, *supra*, 384 U.S. at 230, it held that "[t]he word 'refuse' [as used in the Act] includes all foreign substances and pollutants apart from those 'flowing from streets and sewers and passing therefrom in a liquid state' into the watercourse." As acknowledged by the court below (App. A, *infra*, p. 11a), "following the *Standard Oil* case, it was clear that discharges of refuse not tending adversely to affect navigation were within the scope of Section [13]." And see *United States* v. *Esso Standard Oil Co. of Puerto Rico*, 375 F. 2d 621 (C.A. 3); *United States* v. *Maplewood Poultry*, *supra*, 327 F. Supp. at 688.

Thus the scope of the criminal prohibition in the Refuse Act had been authoritatively settled well be-

fore PICCO made the present illegal discharges into the Monongahela River. In these circumstances, it is no defense to contend that an administrative policy of enforcement seemed to imply a more restrictive interpretation of the statute. As Judge Stapleton observed in his dissent below on this aspect of the case (App. A, *infra*, pp. 26a-27a): "I do not believe that a citizen may reasonably rely on a statement in an administrative regulation when the judicial branch of the government has clearly declared the contrary." [19]

[19] In its offer of proof on this point in the district court, PICCO asserted that it was in part misled into misconstruing the statute by the statement of "a member of the Corps of Engineers," who allegedly told an official of PICCO that "no permit would be necessary if the discharges would not impede navigation" (App. A, *infra*, p. 23a). This advice, however, was purportedly given in 1949 (App. A, *infra*, p. 18a), some seventeen years before this Court's decision in *Standard Oil*. At that time, the industrial plant involved here was not even in operation. Thus the statement, if made at all, would have little bearing on the question whether PICCO can properly raise its due process defense in light of the recent decisions by this and other courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1972.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 71-1840

UNITED STATES OF AMERICA

v.

PENNSYLVANIA INDUSTRIAL CHEMICAL CORPORATION, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued January 18, 1972

Before ADAMS, ROSEN, *Circuit Judges* and STAPLETON, *District Judge*

OPINION OF THE COURT

(Filed May 30, 1972)

ADAMS, *Circuit Judge.*

The issues in this appeal center on the parameters of the Rivers and Harbors Act of 1899 with regard to discharges from an industrial plant into the Mo-

nongahela River,[1] whether in the circumstances of this case a crime has been committed within the terms of the Act, and whether, if the Act applies, the conviction in this case comports with due process considerations.

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[1] Section 13 of the Act, 33 U.S.C. § 407 provides:

"It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: *Provided*, That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: *And provided further*, That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful."

In August, 1970, two teachers at the McKeesport Campus of the Pennsylvania State University canoed along the Monongahela River for the purpose of determining whether manufacturing operations on the river were discharging pollutants into it. They took samples on two different days—August 7 and 19—at two outfalls owned by the defendant, Pennsylvania Industrial Chemical Corp. (PICCO). These were sent to the Allegheny County Testing Laboratory for analysis. Based on the results, the United States Attorney filed a criminal information against PICCO[1] on April 6, 1971. Trial commenced before a jury on June 24, 1971, and the jury returned a verdict of guilty on June 29, 1971.

The points with which we deal in this appeal fall into three broad categories: (1) The general applicability of the statute; (2) Its applicability to the particular circumstances of this case; and (3) The due process grounds to be considered even if the statute would otherwise make PICCO's activities criminal.

I. The Statute is Generally Applicable

Before evidence was presented, the district court preliminarily instructed the jury that the Govern-

[1] Based on the data received from the teachers, informations were filed on the same day against United States Steel Corp., Jones & Laughlin Steel Corp., and Wheeling Pittsburgh Steel Corp. Although PICCO elected to go to trial immediately on its indictment, the other three defendants moved to dismiss the indictments against them in the district court. The motions are now in abeyance pending the outcome of this appeal, and the three were granted status as *amici* in this case.

ment, in order to secure a conviction, was required to prove beyond a reasonable doubt that PICCO had discharged "refuse" matter from its plant, that the "refuse" was discharged into a "navigable water of the United States," and that the discharge was not "flowing from streets and sewers and passing therefrom in a liquid state," one of the exemptions set forth in the Act. The parties stipulated that PICCO owned the pipes through which the discharges entered the river, and that the Monongahela River is a "navigable water of the United States", thereby narrowing the issues for the jury.

PICCO first contends that the Act was intended to make criminal only the discharge of refuse which would impede navigation. Although the legislative history is equivocal on this point, we need look no further, however than United States v. Standard Oil Co. of Puerto Rico, 375 F.2d 621 (3d Cir. 1967), for this Court's holding that the Government need not prove that the discharge created an impediment to navigation in order to secure a conviction. There, petroleum products were spilled on the defendant's land, and, by force of gravity, flowed into navigable water. Both sides there agreed that the defendant was not guilty of violating the second clause of section 407, which forbids the impeding or obstruction of navigation. Yet this court affirmed the conviction based on the first clause, dealing with the discharge of "any refuse". Thus, the Act does apply to discharges of the type here in question, and gives no one the right to discharge "refuse matter of any

kind" into "any navigable water of the United States."[8]

Next, PICCO contends that, even assuming arguendo that the industrial wastes discharged by it were "refuse", the portion of section 407 excepting refuse matter "flowing from streets and sewers and passing therefrom in a liquid state" from the coverage of the Act applies to the discharges here in issue as a matter of law. To support this position, PICCO relies on various texts and dictionary definitions written *circa* 1899, the year the Act became law, for the proposition that sewage was commonly defined to include industrial wastes. Congress, however, appears to have had a very different concern when it enacted the exception dealing with refuse matter "flowing from streets and sewers." As one legal scholar has noted:

> "[T]he sewage exception in the 1899 federal Refuse Act was designed to differentiate locally authorized from unauthorized discharges. By excepting refuse 'flowing from streets and sewers . . . in a liquid state,' Congress expressed

[8] Throughout the trial PICCO attempted to show that the matter flowing through its pipes into the river contained solids in solution, rather than suspension, thereby hoping to prove that its discharges would not "impede navigation". The district court sustained certain objections of the Government to these offers, and did not charge the jury that PICCO's discharges must have impeded navigation. In light of the decision in Standard Oil and the above discussion, this proof would not have constituted a defense. PICCO was not entitled to the charge, and, therefore, the trial court did not err in its rulings in this regard.

awareness of the construction of public sewers, taking cognizance of the practice of the day of combining storm and sanitary sewers. The important point was not that waste made it through the system in a 'liquid state', but rather that local authorities had some control over who connected to a sewer system." Rodgers, *Industrial Water Pollution and the Refuse Act: A Second Chance for Water Quality*, 119 U. PA. L. REV. 761, 778 (1971) (footnote omitted); *cf.* United States v. Republic Steel, 362 U.S. 482, 506 n. 27 (Harlan, J., dissenting).

In addition, the definition of sewage suggested by the Supreme Court does not materially differ from that employed by the district court, United States v. Republic Steel, *supra*, at 490. Moreover, to assert, as does PICCO, that any pipe carrying any wastes may be called a sewer, would erode the salutary command of Congress as stated in the Act in favor of a particular exception. As a matter of law, then, liquid industrial waste flowing through pipes into navigable water is not exempt from the proscriptions of the Act.

The final argument advanced by PICCO in this area of statutory interpretation is that unless section 407 is read in conjunction with the Water Pollution Control Act of 1948, 33 U.S.C. §§ 1151 et seq., its amendments of 1961 and 1965, and the Water and Environmental Quality Improvement Act of 1970, a conflict among the statutes is created. PICCO contends that, in order to resolve the conflict, the district court should have defined "refuse" to incorpo-

rate the water quality standards established pursuant to 33 U.S.C. § 1160(c)(1).

Under the Rivers and Harbors Act of 1899, the discharge of *any* refuse is made subject to a permit program while the newer statutes provide that discharges are proscribed only when they exceed the applicable water quality control standards. The federal standards set by the newer water quality statutes rely primarily on those of the states, with the proviso that in certain circumstances a federal standard may be applied. PICCO offered to prove at the trial that it had a permit from the Commonwealth of Pennsylvania to discharge its effluents into the Monongahela River, and that the discharges met the federal standards by complying with the criteria established by Pennsylvania.

PICCO reasons that if the Government prevails on this appeal, PICCO will be branded a criminal under one statute while it meticulously observes a companion provision aimed at the same goal. PICCO contends that we should resolve this apparent conflict by reading all the pollution acts in *pari materia* to reach an accommodation in the same fashion that the Supreme Court in Boys Market v. Retail Clerk's Union, 398 U.S. 235 (1970), reconciled the anti-injunction provision of the Norris-LaGuardia Act, 29 U.S.C. § 104, with the portion of the Labor Management Relations Act directing the federal courts to take jurisdiction in certain labor disputes, 29 U.S.C. § 185(a).

Such a course of action would be unjustified under the circumstances of this case on a number of grounds. It is crucial to note that beginning with the Water Pollution Control Act of 1948, Congress has on four separate occasions in the past 24 years specifically stated that section 407 of the Rivers and Harbors Act, banning "any refuse matter", was not affected by the subsequent legislation.[4]

Moreover, the Rivers and Harbors Act and the Water Pollution Control Act were designed to accomplish what may be viewed as the same end by different means. The Rivers and Harbors Act, by its terms, stipulates criminal penalties; the Water Pollution Control Act provides for civil actions only. The Rivers and Harbors Act may be enforced against those discharging refuse into any navigable water of the United States, while the Water Pollution Control Act may be used only if the pollution has an interstate effect. Finally, under the Rivers and Harbors Act there is no need for the 180-day notice period prior to the commencement of a civil proceeding as required by the Water Pollution Control Act. In view of these significant differences in approach, and the "cardinal rule that repeals [of legislation] by implication are not favored,"[5] the district court was correct when it declined to define "refuse" as used in the Rivers and Harbors Act in terms of the water

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[4] 33 U.S.C. § 1174.

[5] Lynch v. Household Finance Corp., —— U.S. —— (No. 70-5058, March 28, 1972) (slip opinion at 10) *citing* Posades v. National City Bank, 296 U.S. 497, 503 (1936).

quality standards established pursuant to section 1160(c)(1) of the Water Pollution Control Act.

II. The Circumstances Here Demonstrate That No Crime Was Committed

Although we have held above that it would be improper to accommodate the 1899 Act with recent water pollution legislation by redefining the word "refuse" in the 1899 Act, the provision of a permit program in the 1899 Act is important if some sense is to be made of these statutes.

It should first be pointed out that neither United States v. Standard Oil Co., 384 U.S. 224 (1966), United States v. Republic Steel Corp., *supra*, nor United States v. Standard Oil Co. of Puerto Rico, *supra*, dealt with the existence or non-existence of a permit program under the 1899 Act. In *Republic Steel*, it was clear that the discharges impeded navigation and that no permit was sought or held by the company, while in both *Standard Oil* cases the existence of a permit program was irrelevant because of the accidental nature of the discharges involved. For present purposes, the significance of these cases is that the courts there found a congressional intent that all discharges of refuse of any kind, including discharges of refuse which do not adversely affect navigation, should be subject to regulation. They did not, however, find that Congress intended to prohibit all such discharges.

The conclusion that section 407 of the Rivers and Harbors Act was intended to establish a regulatory program rather than a general prohibition is indicated not only by practical considerations relating to the drastic impact that a general prohibition against discharging any "foreign substance" would have had on the nation's economy even in 1899, but also by Congress' subsequent enactments in the water quality field. There would appear to be something fundamentally inconsistent between the program of developing and enforcing water quality standards under the Water Quality Act and section 407 of the Rivers and Harbors Act, if the effect of the latter is to prohibit all discharges of industrial waste into navigable waters. Congress, however, obviously thought that the two statutes were compatible or it would not have expressly disavowed any intention to repeal or affect section 407 when it enacted the Water Quality Act of 1965. What makes the two statutes compatible is the permit program contemplated by Section 13. The Government recognizes this fact when it describes the purpose of the 1965 and 1970 water quality acts as follows:

> "Congress sought to establish minimum standards under the new laws; the older law was retained, however (33 U.S.C. § 1174), as a foundation. It announces the federal policy that *no* person or corporation has a *right* to discharge into any navigable stream unless permitted to do so. The new law proceeds to state that such permission may not be granted to one whose

discharge would violate the standards to be established."*

The situation in August of 1970, when the discharges here in issue were made, must be evaluated with this in mind. In short, following the *Standard Oil* case it was clear that discharges of refuse not tending adversely to affect navigation were within the scope of section 407. It was also clear, at least by the time of the enactment of the Water Quality Act of 1965, that Congress intended the Secretary of the Army and the Corps of Engineers to administer section 407 not as a vehicle for protecting navigable waters from all discharges of industrial refuse, but rather as a vehicle for furthering the national conservation policy.

PICCO offered to prove in the court below that the executive branch of the Government simply failed to respond to this congressional directive insofar as it related to discharges having no significance for navigation until December of 1970, when the institution of a permit program under section 407 was announced by the President. There would appear to be substantial support for this contention. From 1965 until December of 1968, the only regulation pertain-

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*While Congress did not until the Water Quality Improvement Act of 1970 add to its water quality control legislation an express prohibition against the granting of a § 407 permit for discharges not meeting the water quality standards, this action was an explicit recognition of what Congress must have assumed when it enacted the Water Quality Act of 1965—that applications for permits under § 407 would be acted upon with an eye to the water quality acts.

ing to section 407 of the Rivers and Harbors Act provided as follows:

> "§ 209.395. *Deposit of refuse.* Section 13 of the River and Harbor Act of March 3, 1899 (30 Stat. 1152; 33 U.S.C. 407), prohibits the deposit in navigable waters generally of 'refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state'. The jurisdiction of the Department of the Army, derived from the Federal laws enacted for the protection and preservation of the navigable waters of the United States, is limited and directed to such control as may be necessary to protect the public right of navigation. Action under section 13 has therefore been directed by the Department principally against the discharge of those materials that are obstructive or injurious to navigation." 33 C.F.R. § 209.395 (1967).

PICCO tendered in evidence a publication of the Corps of Engineers dated March 18, 1968. This publication contains the folowing statements, among others:

> "1. Sections 10 and 13 of the River and Harbor Act . . . is (sic) designed to protect navigation and the navigable capacity of Federal navigable waters and places responsibility for enforcement upon the Department of the Army.
>
> 2. The instructions and program that follow in this paragraph deal with the problem of illegal deposits in navigable waterways under the law which explicitly concerns navigation. The Corps of Engineers has a responsibility for pollution

abatement and is carrying out that responsibility under various other media.

3. The concern of the Department of the Army in industrial waste under this program lies in the effect the suspended solids contained in the effluent from industrial outfalls have on navigable capacity of the waterway. The Department is primarily concerned under this program with the shoaling of authorized improved navigation channels and in placing the responsibility and/or cost for moving these shoals on those industries that are causing them."

In December of 1968 the Corps of Engineers of the Department of the Army published a complete revision of Part 209 of the Code of Federal Regulations. While the revision served notice that the Corps of Engineers would consider pollution and other conservation factors in passing on applications under sections 9 and 10 of the Rivers and Harbors Act for permits for "work in navigable waters" (33 C.F.R. § 209.120(d)), the sole reference to section 407 again described it in terms limited to problems of navigation:

"(2) Section 13 of the River and Harbor Act of March 3, 1899 (30 Stat. 1152; 33 U.S.C. 407) authorizes the Secretary of the Army to permit the deposit of refuse matter in navigable waters, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, within limits to be defined and under conditions to be prescribed by him. Although the Department has exercised this authority from time to time, it is considered prefer-

able to act under Section 4 of the River and Harbor Act of March 3, 1905 (33 Stat. 1147; 33 U.S.C. 419). As a means of assisting the Chief of Engineers in determining the effect on anchorage of vessels, the views of the U.S. Coast Guard will be solicited by coordination with the Commander of the local Coast Guard District." 33 C.F.R. § 209.200(e)(2).[7]

This version of Part 209 remained in effect in August of 1970.

The materials which PICCO submitted to the district court appear to indicate that the agency responsible for administering the regulatory program under Section 13 made no determination that its congressional commission required it to deny permits on a blanket basis to all seeking to discharge industrial refuse having no adverse affect on navigation. Nor would the absence of a permit program in this area appear to be the product of a temporary administrative moratorium pending development of appropriate policies and procedures. Rather it would appear that the Corps of Engineers, perhaps as a result of a mistake of law, made a conscious decision to

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[7] The Corps' § 4 jurisdiction was described in the preceding paragraph as follows:

"(1) Section 4 of the River and Harbor Act of March 3, 1905 (33 Stat. 1147; 33 U.S.C. 419), authorizes the Secretary of the Army to prescribe regulations to govern the transportation and dumping into any navigable water, or waters adjacent thereto, of dredgings and other refuse materials *whenever in his judgment such regulations are required in the interest of navigation.*" (Emphasis supplied) 33 C.F.R. § 209.200(e)(1).

decline to undertake the responsibility imposed upon it by Congress.

There is a certain appeal to the crisp conclusion of the district court that Congress intended criminal penalties for one who discharged without a permit and that PICCO concededly had no permit. When viewed in the context of this case and tested with the touchstone of congressional intent, however, this analysis produces an unsound result. Congress contemplated a regulatory program pursuant to which persons in PICCO's position would be able to discharge industrial refuse at the discretion of the Secretary of the Army. It intended criminal penalties for those who failed to comply with this regulatory program. Congress did not, however, intend criminal penalties for people who failed to comply with a nonexistent regulatory program.[8] The members of Congress who enacted the Water Quality Acts of 1965 and 1970 with their "saving provisions" for section 407 of the Rivers and Harbors Act might well be astonished by the broad implications inherent in the judgment of conviction entered below.

Similarly unsound is the Government's contention that the absence of a permit program is irrelevant because PICCO never applied for a permit. If PICCO proves what it has offered to prove and if, as we have

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[8] Research has revealed only one case where the prosecuting authorities have pressed criminal charges under comparable circumstances. The conviction was overturned. Brown v. States, 74 Tax Cr. R. 108, 167 S.W. 348 (Ct. App. 1914). See also Mitchell v. Dixon, 168 S.W.2d 654 (Texas Com. App. 1943).

concluded, Congress did not intend to make failure to comply with a nonexistent program a crime, we do not believe that the axe can stay or fall depending upon whether the defendant did or did not go through the charade of making an application for something which did not exist.

Out of an abundance of caution, we hasten to add that what we have said would have no relevance whatever to any discharge occurring after the implementation of the permit program.[9] Compliance with the water quality standards should not, of course, be a defense to an action brought under section 407 against one who has discharged without a permit. Congress intended that the executive branch of the Government have advance notice of proposed discharges and an opportunity to determine whether such discharges will be consistent with national policy. Accordingly, one who discharges without a permit undermines the program regardless of the character of the discharge. There is a vast difference, however, between a conviction of one who fails to secure an available permit and a conviction of one who fails to secure a permit which is unavailable.[9a] If

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[9] We do not intend to convey the impression that by reversing the conviction here we are indifferent to the need for environmental improvement. However, because federal water quality standards may be forced vigorously as soon as a permit program is implemented, our decision today should have very little effect on the ecological well-being of our nation in the future, and, in fact, this case will have only small implications for the past.

[9a] *See, Sanders, The Refuse Act of 1899; Key to Clean Water*, 58 A.B.A.J. 468, 469 (1972).

this case falls in the latter category, we hold that PICCO has been convicted of a crime which Congress has never created.

III. Even If The Act of 1899 Were Construed To Make PICCO's Activities Criminal, Due Process Considerations Would Require A Reversal

Because of the importance of this case in the ecology field, we are constrained to set forth an alternative basis for our order directing a reversal of the conviction and a remand.[10] The proposition is advanced that when we take together the vagueness of the Act, its history, the administrative interpretation of the Act by the Corps of Engineers, and other actions of the Government, it would be unreasonable to expect an individual or a corporation to conclude that the Act would apply to industrial discharges not affecting navigation.

One of the important aspects of PICCO's contentions relates to the portion of section 407 that authorizes "The Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, [to] permit the deposit of any material above mentioned in navigable waters * * *" The Government agrees that possession of a permit issued by the Secretary would constitute a complete defense to the prosecu-

[10] We are quick to point out that because of the nature of our alternative basis for decision, certain of the rationales advanced here may appear to be inconsistent with those set forth in Part II, *supra*.

tion. The uncontradicted testimony of Mr. William Johnston, a Vice-president of PICCO, showed that at least since 1944 no permit program had been established by the Corps of Engineers for discharges into the Monongahela River. In fact, it was not until December 23, 1970, more than four months after the commission of the act alleged in the indictment, that by Executive Order 11574, 35 Fed. Reg. 19627, the President announced the institution of a permit program under section 407 to achieve compliance with federal water quality standards. Mr. Johnston also testified that in 1949 he had spoken with an individual in the Corps of Engineers office in Pittsburgh and that as a result of that conversation, PICCO never applied for a permit to discharge refuse into the river. PICCO thus takes exception to that portion of the district court's charge which stated, "But it is not the contention of the Defendant that the act was done unknowingly or unintentionally." PICCO objects on the basis that it was acting in a manner consistent with what it thought the law required, and that Mr. Johnston had been told by a member of the Corps of Engineers that the statute did not require a permit for the discharge of industrial wastes not affecting navigation.

The test to determine whether these facts, if true, would be sufficient to make out a due process violation is set forth in the leading case of Connally v. General Construction Co., 269 U.S. 385, 391 (1926):

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform

those who are subject to it that conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

In the situation presented here, however, PICCO claims it was misled by interpretation given to the statute by the Corps of Engineers, the body primarily responsible for the navigable waters of the United States.[11] *Cf*, United States v. Painter, 314 F.2d 959 (4th Cir.), *cert. denied*, 374 U.S. 831 (1963); United States v. Mancuso, 139 F.2d 90 (3d Cir. 1944). There is evidence that prior to December, 1970, the Corps

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[11] Adding to the claimed confusion is the Water Quality Act of 1965, according to which if PICCO obeyed state standards and obtained a state permit, its discharges would not be subject to abatement. Although we held above that PICCO's belief was erroneous that it was not in violation of § 407 because of its alleged compliance with the 1965 Act, PICCO's belief appears not to have been unreasonable or held in bad faith. Moreover, PICCO asserts that to accept the Government's view of the Act, might well create a confiscatory impact. If it is true that no discharge permits have been available from the Corps of Engineers, every industrial concern along the Monongahela, and perhaps throughout a substantial portion of the nation, which uses water from navigable waters in the operation of its plant and puts back something other than pure water would be in violation of the Act. Indeed, for practical purposes, many of these plants might not be able to operate at all.

of Engineers, in its published regulations, had consistently interpreted section 407 to require a permit for industrial discharges only when the effect of the discharges would be to impede navigation, *e.g.*, a deposit of solids on the river bed tending to lower the water level of a navigable channel. The only reference to section 407 in the Corps' regulations governing the issuance of the various permits under the 1899 Act is found at 33 C.F.R. § 209.200(e), reproduced *supra* at 14. Moreover, in an internal regulation published in March, 1968, reproduced *supra* at 14, the Corps noted its concern for navigation only. Because this Court must give great weight to the consistent interpretation of a statute by the agency primarily responsible for its enforcement, Udall v. Tallman, 380 U.S. 1, 16 (1965), PICCO also should be permitted to rely on the Corps' reading of section 407.

It is the position of the Government,[12] on the other hand, that the statute does not require a showing of scienter—criminal intent—and the mere lack of a permit program should not constitute a defense to a criminal charge under section 407.

In its two major decisions concerning the 1899 Act the Supreme Court has not given any indication whether scienter may be a necessary element of the

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[12] Although the Government points to a Corps pamphlet published in 1968 to show its concern with pollution, we do not find the passage to convey clearly the meaning ascribed, and we have grave doubts that PICCO can be held to have knowledge of such materials. *See* Hotch v. United States, 212 F.2d 280 (9th Cir. 1954).

offense under section 407. United States v. Standard Oil Co., 384 U.S. 224 (1966); United States v. Republic Steel Corp., 362 U.S. 482 (1960). In fact, in the *Standard Oil* case, the Court specifically left open the scienter question. 384 U.S. at 230. The Government conceives PICCO's argument as encompassing nothing more than the traditionally rejected defense that ignorance of the law is an excuse.

PICCO does not claim that it did not know the law existed. Its proofs showed that it was well aware of section 407. Rather, PICCO asserts that it was affirmatively misled by the Corps of Engineers to believe that the Act would be inapplicable to discharges of waste that did not impede navigation.

Thus the assertion is not that PICCO was ignorant of the law's application to it and therefore lacked scienter. Instead, it is contended that had it not been for misleading behavior—whether intentional or not—of the Corps of Engineers, PICCO would have been able to decide if it should apply for a permit from the Corps, and depending on the Corps' response to an application, PICCO could have planned its behavior accordingly.

It might be maintained that, if nothing else, the Supreme Court's decisions in *Republic Steel* and *Standard Oil* should have given PICCO notice that it was in violation of the 1899 Act. In *Republic Steel*, it is clear that the industrial discharges impeded navigation contrary to the command of the second clause of section 407. PICCO has claimed throughout the litigation, and the claim is uncon-

tradicted, that its discharges have no navigational effect. *Standard Oil*, on the other hand, dealt with the accidental discharge of aviation fuel, and the Court decided only that commercially valuable substances could be "refuse" for purposes of section 407. Similarly, our decision in United States v. Standard Oil of Puerto Rico, *supra*, is insufficient to have made PICCO aware of its alleged continuing violation of the Act. The issue there was whether the defendant could be responsible for gasoline deposited into navigable waters not directly and intentionally, but which had spilled on defendant's land and by force of gravity flowed into the water. That the 1899 Act has been employed to prosecute one-time accidental deposits of refuse has been clear for some time. *See, e.g.*, La Merced, 84 F.2d 444 (9th Cir. 1936). No decision has been brought to our attention, however, holding criminally responsible an industrial firm whose discharges were not one-time accidents or whose day-to-day discharges had no navigational effect.

In much the same way, the Government's contention that lack of a permit program will not constitute a defense misses the point here. We are presented with much more than the mere absence of a permit program. To begin, it was not unreasonable for PICCO to read section 407 as permitting the discharge of wastes not affecting navigation. The Corps of Engineers, in published regulations, appeared to read the Act in the same way. Until 1970, the Department of Justice concurred in this inter-

pretation of the Act. According to an Assistant Attorney General, "Only until early last year, this statute was administered in the Department of Justice strictly as a criminal statute and it was usually applied to discharges into the navigable waters of the United States which impeded navigation." *Proceedings, Refuse Act of 1899*, 30 Fed. B. J. 327, 328 (1971). When we add to this the proffered testimony of Mr. Johnston that a member of the Corps of Engineers told him no permit would be necessary if the discharges would not impede navigation, it is clear that PICCO does not rely on the mere lack of a permit program. It relies, rather, on the alleged fact that it was affirmatively misled into not applying for a permit.[18]

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[18] In this regard it is interesting to note that if the Federal Criminal Code proposed by the National Commission on Reform of Federal Criminal Laws were the law, PICCO would appear to have a defense under § 609 which reads:

> "Except as otherwise expressly provided, a person's good faith belief that conduct does not constitute a crime is an affirmative defense if he acted in reasonable reliance upon a statement of the law contained in:
>
> (a) a statute or other enactment;
>
> (b) a judicial decision, opinion, order or judgment;
>
> (c) an administrative order or grant of permission; or
>
> (d) an official interpretation of the public servant or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the crime."

As explained in *Working Papers*, National Commission on Reform of Federal Criminal Laws 138 (1970),

[Footnote continued on page 24a]

In such circumstances, the apparent position of the Government may well have been unfair to the point that PICCO's conviction violated due process.[14] The concept of fair play is implicit in our basic notions of what is meant by due process of law. In this regard, an individual or corporation should not be held criminally responsible for activities which could not reasonably have been anticipated to be il-

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[13] [Continued]

> "If a defense or reasonable reliance on a competent (official or unofficial) statement of the law is omitted, prosecutors can be counted on to decline prosecutions where the defense would be plainly and fully applicable. There are, indeed, remarkably few reported cases in which the defense has been at issue. Judges will not be likely to impose severe sentences in the cases brought by a too zealous prosecutor. Nevertheless, a person who would not have violated the law if his reasonable understanding of the law, gained by his own efforts to obtain legal advice or from reliable official statements, had not been mistaken should not find himself in the position of having to depend on the prosecutor's or trial judge's decision not to prosecute for a crime which, in law, he committed."

In this case, the prosecutor did elect to proceed and PICCO was given the maximum fine.

[14] It should also be pointed out that even the Attorney General of the United States, when considering the purpose of a direct predecessor of the 1899 Act, stated:

> "You should be governed only by considerations affecting the navigation of the river and, if there be none now, then by considerations which may affect future navigation, whether it is likely to become important or not, which Congress must be presumed to have had in mind in authorizing the present and large expenditures which have been made in the improvement of the river." 21 Opp. Atty. Gen. 305, 308 (1896).

legal based on 70 years of consistent government interpretation and subsequent behavior. *Cf.*, Bouie v. City of Columbia, 378 U.S. 347, 351 (1964); United States v. Harriss, 347 U.S. 612, 617 (1954). We hold, in the alternative, therefore, because evidence which would have been relevant to PICCO's defense was incorrectly excluded by the district court and because the jury was not instructed regarding such defense, that PICCO is entitled to a new trial.[15]

IV. Proceedings On Remand

Based on our holding in Part II, *supra*, PICCO should be given the opportunity to prove the nonexistence of a permit program at the time of the alleged offenses. Should the evidence show that, in fact, a permit program did exist at the relevant time, then, based on Part III, *supra*, PICCO should be allowed to attempt to prove that the Corps of Engineers affirmatively misled it into believing that a permit was not necessary in its situation.

Accordingly, the judgment of conviction will be reversed and the cause remanded to the district court for proceedings consistent with this opinion.

STAPLETON, *District Judge*, Concurring.

I concur in the views expressed in the first two sections of the majority's opinion. I am unable, however, to subscribe to the views stated in the third section of that opinion.

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[15] The holdings of parts II and III of this opinion are limited to the record with which we have been presented.

In *United States* v. *Standard Oil Co.*, 384 U.S. 224, 230 (1966) the Supreme Court of the United States concluded that "the word 'refuse' [as used in Section 13 of the Rivers and Harbors Act] includes all foreign substances and pollutants apart from those 'flowing from streets and sewers and passing therefrom in a liquid state' into the water course." In *United States* v. *Esso Standard Oil Co. of Puerto Rico*, 375 F.2d 671 (3rd Cir. 1967), this Court followed suit by upholding a conviction under Section 13 in a case where there was no evidence that the discharge might adversely affect navigation. I find it difficult to assign to these pronouncements the limited significance given them in the third section of the majority's opinion.

As I read this portion of the majority's opinion, it holds that despite the pronouncements of the courts in these cases, PICCO may successfully assert a defense that it was affirmatively misled by the regulations of the Corps of Engineers into believing that Section 13 did not apply to discharges which would not adversely affect navigation. While I agree that the Due Process Clause may require a court to recognize the defense suggested by Section 609 of the proposed Federal Criminal Code and may encompass a theory of estoppel even in criminal cases,[1] I do not believe that a citizen may reasonably rely on a statement in an administrative regulation when the judi-

[1] See Note, *Applying Estoppel Principles in Criminal Cases*, 78 Yale L. J. 1046 (1969).

cial branch of the government has clearly declared the contrary.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 71-1840

UNITED STATES OF AMERICA

vs.

PENNSYLVANIA INDUSTRIAL CHEMICAL CORPORATION, A Corporation, APPELLANT

(D.C. Criminal No. 71-75)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: ADAMS and ROSEN, *Circuit Judges*, and STAPLETON, *District Judge*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this Court that the judgment of said District Court, filed July 30, 1971, be, and the same is hereby reversed, and the cause remanded for proceedings consistent with the opinion of this Court.

ATTEST:

Thomas F. Quinn (signature)
Clerk

May 30, 1972

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 71-75 Criminal

UNITED STATES OF AMERICA

vs.

PENNSYLVANIA INDUSTRIAL CHEMICAL CORPORATION, a Corporation

MEMORANDUM OPINION

HUBERT I. TEITELBAUM, District Judge

The defendant, Pennsylvania Industrial Chemical Corporation ("PICO"), was convicted on four counts of discharging refuse matter into a navigable water of the United States in violation of 33 U.S.C. § 407, commonly known as the Rivers and Harbors, or Refuse, Act of 1899.[1] The defendant filed no post-

[1] Section 407 of 33 U.S.C. provides, in pertinent part, that, "[I]t shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water . . . [provided that] the Secretary of the Army, whenever in the judgment of the Chief of

trial motions. However, in view of the novelty of the legal issues involved, it is deemed appropriate to file this memorandum opinion; focusing, in part, on matters raised on defendant's Motion for Judgment of Acquittal.

Factually, the issues were few and simple. The information charged PICO, in four counts, with discharging and depositing refuse matter into the Monongahela River. Counts I and II dealt with effluent sampled from a certain concrete pipe on August 7 and 19, 1970, respectively, and Counts III and IV dealt with effluents sampled from a certain iron pipe on August 7 and 19, 1970, respectively. It was stipulated that PICO was the owner of a manufacturing establishment (a chemical plant) situated on the banks of the Monongahela River, that the concrete pipe and the iron pipe from which the discharges were sampled were owned by PICO, and that the Monongahela River is a navigable water of the United States. It was uncontroverted that while the concrete pipe served not only the defendant's manufacturing establishment but also a nearby residential area comprised of approximately six to eight houses, the iron pipe served the defendant's chemical plant exclusively. It was further uncontroverted that the defendant had not secured and in fact, had not applied for, a permit prior to the discharges. The con-

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Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters . . . provided application is made to him prior to depositing such material. . . ."

troverted factual issues were as to the nature of the sampled discharges. The Government's expert characterized each of the samples as "industrial waste." The defendant's expert expressed skepticism at conclusively characterizing the effluent sampled from the concrete pipe on August 7, 1970 as "industrial discharge." He conceded that the other three samples were properly characterizable as "industrial discharge." He distinguished, however, between "industrial waste" and "industrial discharge." He treated "industrial discharge" as a term applicable to the effluent from the time it left the pipe until it reached the river and considered that whether or not it was "industrial waste" depended upon its effect upon the river. As applied to the instant case, this is a distinction without a difference. The Refuse Act prohibits the discharge of *any* refuse matter, regardless of its effect, without a permit. This blanket prohibition is a clear expression of Congressional concern with the cumulative effect of many individually insignificant discharges. Thus, the effect of the particular effluent upon the river is irrelevant and testimony concerning it was excluded. When the Congress interdicted "any" discharge, it meant just that: that without a permit absolutely *no* amount of discharge was lawful. The defendant's suggested definition of refuse matter relating to the effect on the navigable water of the "industrial discharge" will be further dealt with hereinafter with regard to the defendant's Motion for Judgment of Acquittal.

The Court's charge to the jury defined "refuse matter" as encompassing, in *any* amount, all foreign

substances and pollutants, except those flowing from streets and sewers in a liquid state, including industrial waste. This composite definition, which undoubtedly undermined the defendant's distinction, was taken directly from the decisions of the Supreme Court in *United States* v. *Standard Oil*, 384 U.S. 224 (1966) and *United States* v. *Republic Steel*, 362 U.S. 482 (1960). The excepted refuse matter, i.e., that flowing from streets and sewers and passing therefrom in a liquid state was defined to the jury as meaning, "sewage," which again, was taken directly from *Republic Steel* in which the Supreme Court stated that,

> "[R]efuse flowing from 'sewers' in a 'liquid state' means to us 'sewage.'"

"Sewage" was defined to the jury as, generally, that water, filth, and feculent matter deriving usually from human and domestic waste, but not including industrial waste.[2] Not surprisingly, the jury's finding, which must be construed, in conformity with the jury's verdict, in the light most favorable to the Government,[3] was that each of the effluents was "industrial waste," not "sewage," and therefore refuse matter in violation of the Refuse Act.

The defendant's Motion for Judgment of Acquittal at the close of the Government's case and renewed,

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[2] This definition was forged from discussions found at 25 Am. Jur. 2d, Drains and Drainage Districts § 1, 39 Words and Phrases 100, and the cases cited therein.

[3] *Glasser* v. *United States*, 315 U.S. 60 (1942).

in effect, after the close of all of the testimony, was based essentially on three grounds: (1) that both the concrete and iron pipes were "sewers" and therefore the refuse matter flowing therefrom was excepted from the prohibition of the Refuse Act; (2) that by the terms of the regulations adopted pursuant to the Refuse Act by the Secretary of the Army on April 7, 1971, the defendant had until July 1, 1971, to secure a permit to discharge refuse matter; and (3) that the matter which the defendant was discharging was in complete compliance with the water quality standards established by the Commonwealth of Pennsylvania and therefore not violative of the Act. The relevance of the regulations adopted by the Secretary and the water quality standards established by Pennsylvania, additionally, dogged the trial in the form of evidentiary offerings and rulings. At the trial both of them were regarded as irrelevant and were excluded from the evidence. An examination of each of these contentions follows:

I. The Definition of the Excepted Refuse Matter

The defendant sought to define the excepted refuse matter as including any and all matters flowing in a liquid state from an underground conduit. To support its definition, it offered Webster's definition of "sewer": an artificial usually subterranean conduit to carry off water and waste matter. That definition is not doubted. The word "sewer," however, does not stand alone in the exception. It is refuse matter

which flows from streets and sewers and passes therefrom in a liquid state which is excepted. And that refuse matter meant to the Supreme Court in *Republic Steel* simply "sewage." What becomes important, then, in determining what refuse matter is excepted is the determination not of the construction or location of a particular conduit, but rather what it carries off. Therefore, the defendant's offered definition and effect of the term "sewer" was rejected, and *Republic Steel's* definition of the excepted refuse matter was submitted to the jury. Defendant's contention that anything which flows from a pipe is excepted from the interdiction of the Act is untenable.

II. The Relevance of the Absence of an Established Permit Program

The second ground of the defendant's contentions was that by virtue of the regulations[4] adopted by the Secretary of the Army on April 1, 1971, it had until July 1, 1971, to secure a permit to discharge refuse matter. Proposed and adopted expressly to establish a procedure for the issuance, pursuant to § 407 of the Refuse Act, of permits for discharges or deposits into navigable waters, the regulations, by § 209.131 (d)(3), clearly provide that all persons who are required by § 407 to secure a permit must do so no later than July 1, 1971. This provision, the defendant argued, implicitly suspended the enforcement of the

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[4] The regulations, contained in § 209.131 of Part 202, Chapter II, Title 33 of the Code of Federal Regulations, were published at 36 Fed. Reg. 67, p. 6564 *et seq.*

Refuse Act until that date. Section 209.131(d)(4), however, uncompromisingly refutes that contention. That subsection provides that,

> ". . . the mere filing of an application requesting permission to discharge or deposit into navigable waters or tributaries thereof will not preclude legal action in appropriate cases for Refuse Act violations".

Nothing could be more clear.

Alternatively, the defendant argued that the Government's admitted failure to estalish permit procedures (particularly its failure to adopt application forms) under the Refuse Act until 1971 estopped its enforcement in 1970. The argument is not that the defendant had applied for and was denied a permit or that it attempted to apply for a permit and was unsuccessful. The defendant admitted that it had never attempted to secure a permit. The argument is simply that since the permit provision of the Refuse Act was neglected by the Government, the defendant was similarly entitled to neglect it. The language of § 407 disputes that entitlement. It provides that *prior* to the discharge of refuse matter, application must be made *to* the Secretary of the Army. It does not make it incumbent upon the Government to solicit applications; it makes it incumbent upon whomever proposes to discharge refuse matter to apply for a permit. Therefore the absence of an established procedure regarding the issuance of permits was deemed irrelevant.

III. The Interrelationship of the Refuse Act With Pennsylvania's Water Quality Standards

More problematical, though ultimately equally ill-founded, is the defendant's third contention. By it, the defendant contended that all of the matter discharged satisfied the water quality control standards of the Commonwealth of Pennsylvania and that, therefore, the Refuse Act was not violated. The defendant also sought to introduce the standards into evidence. Both the contention and the offer were rejected.

The heart of the defendant's argument was that the Federal Water Pollution Control Act, 33 U.S.C. §§ 1151 to 1175, which was enacted into law by Congress in 1948 and amended as late as 1970, was a more contemporary Congressional decree on the subject of discharge into or pollution of navigable waters of the United States, and that therefore in harmonizing any conflicting policies of the Refuse Act with that Act, the former should be accommodated to the latter. The issue is not to be confused with that of whether or not the Refuse Act was designed to curb or control pollution of the nation's navigable waters. That issue was foreclosed by the Supreme Court in *Standard Oil* when it squarely and unmistakably resolved that the injury to the nation's waters "sought to be remedied was caused . . . in part by pollution".[5]

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[5] This construction first appears in *La Merced*, 84 F.2d 444 (C.A. 9, 1936) and was recently the clear holding in *United States* v. *U. S. Steel*, Criminal No. 70 H Cr. 12 (N.D. Ind.,

Additionally, the decision of this Circuit in *United States* v. *Esso Standard Oil Co.*, 375 F.2d 621 (C.A. 3, 1967) is founded upon the assumption that § 407 is for the purpose of preventing pollution as well as insuring unobstructed navigation. This Court cannot reopen that issue. The issue here is whether or not the Water Pollution Control Act sets up standards by which discharged matter may be determined to be or not to be refuse matter within the meaning of the Refuse Act.

The short answer to that inquiry is found in § 1174 of the Water Pollution Control Act. Enacted into law as a part of the 1965 amendments, and amended in 1970, § 1174 provides that the Water Pollution Control Act shall not be construed as "affecting or impairing the provisions of Section[s] 407". If, as must be assumed, the 1970 amendments were with full awareness of the Supreme Court's decision in *Standard Oil*, it seems obvious that the Congress chose to maintain rather than retrench from the provisions of § 407 as judicially interpreted.

The long answer is to consider the substances of the two Acts. The announced purpose of the Water

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Nov. 10, 1970) and *United States* v. *Maplewood Poultry Co.*, Criminal Nos. 5290, 5293, 5291 and 5299 (D. Me., June 10, 1971). The only reported decision construing § 407 to the contrary appears to be *Guthrie* v. *Alabama By-Products Company*, Civil No. 71-21 (N.D. Ala., June 21, 1971) in which the Court, confronted with a suit by lower riparian landowners seeking to assert a private right of action under § 407, decided that since the Refuse Act was designed to protect navigation rather than prevent pollution no private right of action inured to the plaintiffs.

Pollution Control Act is "to enhance the quality and value of our water resources and to establish a national policy for the prevention, control, and abatement of water pollution". If, as the Supreme Court has stated, the Refuse Act was at least partially intended to prevent pollution, the two Acts coincide in purpose. What differentiates them is the approach which each takes to achieve its purpose.

The approach of the Water Pollution Control Act, by the 1965 amendments, is to encourage individual states to establish "water quality criteria" which at the instance of the states the Federal government will enforce.* The act contemplates the adoption by the Federal government of acceptable state standards. Alternatively, the Act empowers the Federal government to establish standards. In addition to subjecting transgressors of state established and Federally adopted standards to abatement procedures, the Act requires, by § 1171(b)(1), that any applicant for a Federal permit to engage in an activity "which may result in any discharge into the navigable waters of the United States" shall provide the permitting authorities with certification from the state water pollution control agency that there is reasonable assurance that such discharge will not violate the applicable water quality standards. Without such certification, or if such certification is denied, no permit is issuable. To complement this provision, the regulations adopted by the Secretary of the Army on

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* See, particularly, 33 U.S.C. § 1160.

April 7, 1971, regarding permits for discharge or deposits into navigable waters pursuant to the Refuse Act forbid the issuance of a permit thereunder if an applicant is required to obtain state certification that its proposed discharge will not violate applicable water quality standards (as the Water Pollution Control Act requires) and such certification was denied.

Such certification, however, is by no means the sole determinant of the issuability of a permit. The regulations allow for the denial of a permit on several other grounds, including the impact on fish and wildlife and the risk to health or safety. Although the regulations command the Army Corps of Engineers to accept the findings of the Administrator of the Environmental Protection Agency (the agency responsible for the administration of the Water Pollution Control Act) respecting the applicable water quality standards and related water quality considerations, they empower the Corps of Engineers to make independent findings as to the other considerations relevant to the determination of whether or not a permit should issue. The supplemental independent authority given the Corps of Engineers suggests that the standards of the Water Pollution Control Act were intended to assist rather than supplant the application of the Refuse Act. Indeed the standards under the Refuse Act are more stringent. The apparent and logical purpose of the Congress in retaining the Refuse Act is to apply its permit provisions to obtain advance assurances of compliance with the

standards of the Water Pollution Control Act. The harmony between the two Acts therefore, if imperfect, is not improbable.

The defendant's additional argument is that the Refuse Act makes a crime what the Water Pollution Control Act authorizes. This argument overlooks the permit provisions of the Refuse Act which are, in effect, its saving grace. The Refuse Act prohibits only the discharge of refuse matter into navigable waters without *first* securing a permit. Again, the standards under the Water Pollution Control Act come into play in determining whether or not a permit should issue. And that is a matter exclusively for the Corps of Engineers, not a jury. Thus, to deem the water quality standards of Pennsylvania relevant in determining whether or not matter discharged into navigable waters is "refuse matter" within the meaning of the Refuse Act in a criminal proceeding would require a judicial restructuring of the Congressional scheme. See *United States* v. *Interlake Steel Corporation*, 297 F. Supp. 912 (D.C. N.D. Ill., E.D., 1969). Therefore they were rejected.

For these reasons the defendant's Motion for Judgment of Acquittal prior to verdict was denied and the offer of evidence of the absence of either an established permit procedure or application forms for

permits and of the water quality standards of Pennsylvania were rejected.

/s/ Hubert I. Teitelbaum
HUBERT I. TEITELBAUM
United States District Judge

Date: July 26, 1971

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 71-1840

UNITED STATES OF AMERICA

v.

PENNSYLVANIA INDUSTRIAL CHEMICAL CORP.

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, ROSEN, HUNTER, *Circuit Judges*, STAPLETON, *District Judge*

The petition for rehearing filed by United States of America in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Arlen M. Adams
Judge

Dated: August 21, 1972

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